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SEBIRO HOLDINGS SDN BHD v. BHAG SINGH & ANOR

COURT OF APPEAL, KUCHING
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
ABDUL RAHMAN SEBLI JCA

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[CIVIL APPEAL NO: Q-01-338-10-2013]
17 MARCH 2015

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ARBITRATION: *Arbitrator – Revocation of appointment – Arbitration of contractual dispute – Request for appointment of specific arbitrator rejected by Director of Kuala Lumpur Regional Centre for Arbitration ('KLRCA') – Preference over specific arbitrator due to his knowledge on locality of place of performance – Whether reason valid – Application to revoke arbitrator appointed by Director of KLRCA to arbitrate dispute dismissed by High Court – Appeal against decision of High Court – Whether KLRCA must consult parties before appointing arbitrator – Whether seat of arbitration should be where dispute had closest and real connection – Arbitration Act 2005, s. 13*

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When the second respondent terminated the contract which it had entered with the appellant, the latter proposed Tan Sri Datuk Amar Steve ('TSDAS') to be the sole arbitrator for the arbitration of the dispute. The second respondent disagreed with the proposal and suggested to the appellant to request from the Director of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') for an appointment of an arbitrator. In its letter requesting for the appointment of an arbitrator to the KLRCA, the appellant indicated its preference over TSDAS as the arbitrator because of his knowledge of locality of the place of performance of the contract. The KLRCA replied stating their inability to appoint TSDAS due to the objection by the second respondent. Instead, the first respondent was appointed to hear and decide the dispute. The appointment of the first respondent was disputed by the appellant as it was alleged that the first respondent lacked geographical knowledge of Sarawak as he was not from Sarawak and was therefore unqualified. According to the Director of KLRCA, the arbitration matter was not administered by the KLRCA under its arbitration rules and as such,

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the KLRCA was *functus officio* upon appointing the arbitrator for the arbitration. Dissatisfied, the appellant filed an originating summons in the High Court to, *inter alia*, terminate the appointment of the first respondent and for an order that the seat of arbitration was to be in Sarawak. The High Court dismissed the application and hence, the present appeal. The appellant submitted that (i) the KLRCA had breached their duties to act fairly and to consult the appellant as to whether the alternative proposed arbitrator with local knowledge would be acceptable to the appellant; and (ii) the High Court Judge had failed to appreciate sufficiently or at all that the seat of arbitration should be in Sarawak where the dispute had the closest and real connection and where the performance of the contract was executed.

Held (dismissing appeal with costs)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) Under the contract, the parties had agreed that in the event the second respondent and the appellant failed to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the person named in the appendix of the conditions of the contract *ie*, the Director of the KLRCA. It is clear from s. 13(8) of the Arbitration Act 2005 that the Director of the KLRCA is empowered to appoint an arbitrator. This section does not stipulate that before the appointment of an arbitrator, the consent of the parties is required nor does it stipulate that before the arbitrator is appointed, the Director of the KLRCA is required to seek consent of the parties. (paras 14 & 16)

(2) Although it could not be denied that TSDAS, being a Sarawakian, was in a better position to appreciate the geography of the project site but that was not to say that the first respondent could not be forced, by the circumstances of his appointment, to quickly acquire the same knowledge. If the needs arise, evidence could be led to show the geographical impediments which were of concern to the appellant and the parties could even suggest to the arbitrator to visit the project site. The knowledge is not impossible to acquire and is not such that is dependent on the inherent capability of the appellant's arbitrator of choice. (para 19)

(3) The parties had agreed under the contract that the arbitration was to be conducted at the KLRCA in Kuala Lumpur. Arbitration is a matter of contract and the court must rigorously enforce arbitration agreement according to their terms, including terms that specify the appointment of an arbitrator that will arbitrate their dispute. The arbitrator had already been appointed. He should proceed in the matter and decide the dispute expeditiously. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Apabila responden kedua menamatkan kontrak yang dimeterai olehnya dengan perayu, perayu mencadangkan agar Tan Sri Datuk Amar Steve ('TSDAS') menjadi satu-satunya penimbang tara bagi timbang tara pertikaian tersebut. Responden kedua tidak bersetuju dengan cadangan tersebut dan mencadangkan kepada perayu agar memohon daripada Pengarah Pusat Timbang Tara Serantau Kuala Lumpur ('KLRCA') bagi pelantikan seorang penimbang tara. Dalam surat memohon pelantikan seorang penimbang tara kepada KLRCA, perayu menyatakan kecenderungannya memilih TSDAS sebagai penimbang tara kerana pengetahuan beliau mengenai kawasan tempat pelaksanaan kontrak. KLRCA membalas dengan menyatakan bahawa mereka tidak boleh melantik TSDAS akibat bantahan daripada responden kedua. Sebaliknya, responden pertama dilantik untuk membicarakan dan memutuskan pertikaian tersebut. Pelantikan responden pertama dipertikai oleh perayu kerana didakwa bahawa responden pertama kurang berpengetahuan mengenai geografi Sarawak kerana dia tidak berasal dari Sarawak dan oleh itu tidak layak. Menurut Pengarah KLRCA, hal perkara timbang tara tersebut tidak ditadbir oleh KLRCA di bawah peraturan timbang taranya dan dengan itu, KLRCA adalah *functus officio* setelah melantik penimbang tara bagi timbang tara tersebut. Tidak berpuas hati, perayu memfailkan saman pemula di Mahkamah Tinggi untuk, antara lain, menamatkan pelantikan responden pertama dan bagi satu perintah bahawa tempat timbang tara adalah di Sarawak. Mahkamah Tinggi menolak permohonan dan oleh itu, rayuan ini. Perayu menghujahkan bahawa (i) KLRCA telah melanggar tugas mereka untuk bertindak dengan adil dan merujuk kepada perayu mengenai sama ada penimbang tara alternatif yang dicadangkan dengan pengetahuan setempat boleh diterima oleh perayu; dan (ii) Hakim Mahkamah Tinggi gagal mempertimbangkan secukupnya atau sama sekali bahawa tempat timbang tara sepatutnya di Sarawak di mana pertikaian tersebut mempunyai perkaitan paling dekat dan sebenar dan di mana pelaksanaan kontrak tersebut dijalankan.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Di bawah kontrak, pihak-pihak telah bersetuju bahawa sekiranya responden kedua dan perayu gagal bersetuju dengan pelantikan penimbang tara, seorang penimbang tara akan dilantik oleh pihak yang dinamakan dalam lampiran syarat-syarat kontrak iaitu Pengarah KLRCA. Adalah jelas daripada s. 13(8) Akta Timbang Tara 2005 bahawa Pengarah KLRCA mempunyai kuasa untuk melantik penimbang tara. Seksyen ini tidak menyatakan bahawa sebelum pelantikan seorang penimbang tara, persetujuan pihak-pihak diperlukan dan ia tidak menyatakan bahawa sebelum penimbang tara dilantik, Pengarah KLRCA perlu meminta kebenaran pihak-pihak.

(2) Walaupun tidak dinafikan bahawa TSDAS, seorang yang berasal dari Sarawak, berada dalam kedudukan yang lebih baik memahami geografi kawasan projek tersebut tetapi tidak boleh dikatakan bahawa responden pertama tidak boleh terpaksa, berdasarkan hal keadaan pelantikannya, menguasai pengetahuan tersebut dengan cepat. Jika timbul keperluan, keterangan boleh dikemukakan untuk menunjukkan halangan geografi yang menjadi kebimbangan perayu dan malah pihak-pihak boleh mencadangkan kepada penimbang tara untuk melawat tapak projek. Pengetahuan tersebut tidak mustahil untuk diperolehi dan sesuatu yang mana bergantung kepada kebolehan inheren penimbang tara yang dipilih oleh perayu.

(3) Pihak-pihak telah bersetuju di bawah kontrak agar timbang tara dijalankan di KLRCA di Kuala Lumpur. Timbang tara adalah hal perkara kontrak dan mahkamah mestilah menguatkuasakan perjanjian timbang tara dengan ketat menurut terma-terma, termasuk terma-terma yang menyatakan pelantikan penimbang tara yang akan menimbang tara pertikaian mereka. Penimbang tara telah pun dilantik. Beliau harus meneruskan dengan hal perkara ini dan memutuskan pertikaian dengan cepat.

Case(s) referred to:

Hindustan Steel Works Construction Ltd v. Chotanagpur Mining Corporation AIR 1973 Pat 416 ***(refd)***

State v. DC Degara 1984 58 Cut LT 643 ***(refd)***

State of Orissa v. Gangaram Chhapolia AIR 1982 54 Cut LT 214 ***(refd)***

Legislation referred to:

Arbitration Act 2005, sub-ss. 13(4), (5)(b), 13(8), 15(1)

For the appellant - Arthur Lee Cheng Chuan (Parameswary Shanmugam with him); M/s Arthur Lee, Lin & Co Advocs

For the respondent - Nur Irmawatie Daud; SFC

[Editor's note: For the High Court judgment, please see Sebiro Holdings Sdn Bhd v. Bhag Singh & Anor [2013] 1 LNS 1394.]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This is an appeal against the decision of the High Court at Kuching in which the appellant's originating summons seeking, *inter alia*, for a declaration that the first respondent's appointment as an arbitrator in the dispute between the appellant and the respondent be terminated with immediate effect and for an order that the seat of arbitration to be in Sarawak was dismissed with costs.

A **Background Facts**

[2] The appellant and the second respondent are entangled in a disagreement over the appointment of an arbitrator by the Director of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") to hear and decide their dispute related to the alleged unlawful termination of the
B contract by the second respondent.

[3] For the purpose of appreciating the competing contentions urged on behalf of the parties, the brief facts may be stated as follows:

(a) The appellant entered into an agreement with the second respondent for
C a contract No: KP/BPO/PEM/58/2008 ("contract") dated 27 February 2009 with regard to "Projek Gantian dan Naik Taraf Sekolah-Sekolah di Sarawak" ("contract").

(b) The second respondent terminated the contract on the ground of the alleged failure of the appellant to complete the project on time in
D accordance with contract and the same had been notified to the appellant by way of a letter dated 22 February 2013.

(c) The appellant's advocate sent a notice of intention to commence arbitration to the Ministry of Education on 28 February 2013. In this letter, the appellant had disputed the determination of the contract and
E bill of quantity issued by the second respondent.

(d) The appellant's advocate sent another letter dated 18 April 2013 to the Attorney General's Chambers Malaysia ("AGC") in relation to the said notice of arbitration and proposed Y Bhg Tan Sri Datuk Amar Steve
F Shim Lip Kiong ("TSDASS") as a sole arbitrator.

(e) On 13 May 2013, AGC, on behalf of the second respondent, sent a reply to the appellant's advocate disagreeing with the appellant's proposal to appoint TSDASS as a sole arbitrator and suggested to the appellant to write to the Director of the KLRCA to appoint an arbitrator pursuant
G to sub-s. 13(5)(b) of the Arbitration Act 2005 (Act 646).

(f) The appellant's advocate wrote to KLRCA on 15 May 2013 requesting KLRCA to appoint a sole arbitrator. The appellant's advocate also indicated in the letter that TSDASS is their client's choice due to his knowledge of locality of the place of performance of the said contract
H and his previous experience as a Federal Court Judge, Court of Appeal Judge, High Court Judge and the former Chief Judge of Sabah and Sarawak.

(g) The KLRCA replied to the said letter on 17 May 2013 stating that they were unable to appoint TSDASS as a sole arbitrator as the second
I respondent had objected to the proposed appointment.

(h) The Director of the KLRCA appointed Mr Bhag Singh, the first respondent, as the sole arbitrator to hear and decide the dispute between the appellant and the second respondent. The parties were informed through a letter dated 3 June 2013 from the first respondent.

(i) On 24 June 2013, the appellant's advocate sent a letter to KLRCA and a copy of the same to Mr Bhag Singh disputing the said appointment on the ground that the appointed arbitrator is not from Sarawak and he was deemed to be unqualified due to lack of geographical knowledge of Sarawak.

(j) On 14 June 2013, the appellant's advocate received a letter from the Director of the KLRCA stating that the arbitration matter was not administered by the KLRCA under its arbitration rules and as such the KLRCA was *functus officio* upon appointing the sole arbitrator to the arbitration matter.

(k) Dissatisfied with the appointment, the appellant filed the originating summons to, *inter alia*, terminate the appointment of Mr Bhag Singh and for an order that the seat of arbitration to be in Sarawak where the performance of the contract was executed.

Findings Of The High Court

[4] The learned High Court Judge found the originating summons bereft of merit and dismissed the same with costs. The learned judge in a very detailed and well-reasoned judgment set out carefully the arguments of the parties and explained her reasons for rejecting the appellant's case and accepting the respondent's submission.

[5] We do not propose to rehearse the grounds of judgment except to highlight the learned judge's key findings as follows:

(a) The application by the appellant is premature and not in order because according to sub-s. 15(1) of Act 646, the opposition to the appointment must be made to the arbitrator appointed within 15 days from the time they were aware of his appointment by sending him a written statement on the grounds relied on for challenging the same. The appellant fails to do so.

(b) The challenge must be made under sub-s. 15(1) of Act 646 and not under O. 69 of the Rules of Court 2012.

(c) In their letter dated 15 May 2013 to KLRCA for the appointment of the arbitrator and the proposal on their choice arbitrator, the appellant did not indicate the specific requirement that the arbitrator be one with a special knowledge of the geography of Sarawak.

(d) The parties had agreed in the contract that the arbitration was to be conducted at the KLRCA Kuala Lumpur.

[6] We find no cogent reasons to disturb the learned judge's findings and determination. The learned judge interpreted and applied the law correctly, and therefore, we affirm the decision of the learned judge.

[7] Nonetheless, for the sake of completeness, we will address the grounds raised by the appellant in this instant appeal.

The Appeal

[8] Before us, learned counsel for the appellant confined his submissions to two main grounds as follows:

(i) the KLRCA had breached their duties to act fairly and to consult the appellant as whether the alternative proposed arbitrator with local knowledge would be acceptable by the appellant; and

(ii) the learned High Court Judge erred in fact and in law in failing to appreciate sufficiently or at all that the seat of arbitration should be in Sarawak where the dispute had the closest and real connection and where the performance of the Contract was executed.

Ground (i)

[9] As regards the first ground, learned counsel for the appellant submitted that the KLRCA had appointed the first respondent unilaterally without considering the appellant's request by way of letters dated 15 May 2013 and 11 June 2013 respectively to appoint TSDASS as a sole arbitrator. It was the contention of learned counsel that the choice of arbitrator should or ought to be that of the parties in dispute. Both parties must have equal rights in selecting their arbitrator(s). It is important that parties have confidence in the arbitrator(s) and the proceedings, which means they must have the right to challenge an arbitrator who does not inspire confidence.

[10] In support of his submissions, reliance was placed on the case of *Hindustan Steel Works Construction Ltd v. Chotanagpur Mining Corporation* AIR 1973 Pat 416, *State v. DC Degara* 1984 58 Cut LT 643, *State of Orissa v. Gangaram Chhapolia* AIR 1982 54 Cut LT 214. According to learned counsel, the principle of all these cases is that parties have to be heard not only regarding the appointment but also the person to be appointed as arbitrator.

[11] As regards the second ground, learned counsel for the appellant submitted that the seat of arbitration should be in Sarawak as the material witnesses are from Kuching, Kapit and Kuala Lumpur.

Our Analysis And Findings

[12] As we have alluded to earlier, the parties could not agree on any person to be appointed as an arbitrator to arbitrate the dispute between them. As suggested by the second respondent, on 3 June 2013, the appellant's advocate sent a letter to the Director of the KLRCA requesting him to

appoint a person to be the arbitrator of the dispute pursuant to sub-s. 13(5)(a) and (b) of the Act 646. The Director of the KLRCA had appointed the first respondent as sole arbitrator in the matter.

[13] It bears reiterating that though arbitration is intended for a voluntary process, once a dispute has arisen, even parties acting *bona fide* find it difficult to agree, *ex post facto*. Parties may attempt to obstruct the appointment to delay the arbitration. This can frustrate the agreement. In our view, sub-ss. 13(3) and (5) of Act 646 are a means of breaking deadlock that render the agreement inoperable. Subsections 13(4) and (5) are in the following terms:

> (4) Where subsection (3) applies and:
>
> (a) a party fails to appoint an arbitrator within thirty days of receipt of a request in writing to do so from the other party; or
>
> (b) the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment or such extended period as the parties may agree, either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration for such appointment.
>
> (5) Where in an arbitration with a single arbitrator:
>
> (a) the parties fail to agree on the procedure referred to in subsection (2); and
>
> (b) the parties fail to agree on the arbitrator, either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration for the appointment of an arbitrator.

[14] In this instant appeal, by virtue of cl. 59(h) of the contract, the parties had agreed that in the event the second respondent and the appellant fail to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the person named in the appendix to the conditions of the contract, ie, the Director of the KLRCA.

[15] As regards qualification of an arbitrator to be appointed, sub-s. 13(8) of Act 646 provides that the Director of the KLRCA shall have regard to:

> (a) any qualification required of the arbitrator by the agreement of the parties;
>
> (b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and
>
> (c) ...

[16] It is clear from sub-s. 13(8), that the Director of the KLRCA is empowered to appoint a sole arbitrator. The section does not stipulate that before the appointment of a sole arbitrator, the consent of the parties is required nor does it stipulate that before the arbitrator is appointed, the Director of the KLRCA is required to seek consent of the parties.

[17] It should be noted that the power exercised by the Director of the KLRCA under sub-ss. 13(4) and (5) of Act 646 is an administrative power. The Director of the KLCRA is not required to determine the question of the validity of the arbitration agreement, the maintainability and arbitrability of the claim and other jurisdictional matters. The subsections merely provide for the Director of the KLRCA to appoint arbitrator(s) in the event the parties fail to agree on the arbitration. The director's function is not a judicial function where he has to afford the right to be heard to the parties before an arbitrator(s) is appointed.

[18] We are in full agreement with the findings of the learned judge that there was no pre-agreement between the parties on the qualification of an arbitrator in this instant appeal.

[19] Learned counsel for the appellant forcefully argued that TSDASS is a fit and proper person to hear the matter because, *inter alia*, he is the former Chief Judge of Sabah and Sarawak and has held high judicial office before he retired and he has acquired local knowledge that are relevant to understanding the appellant's claim to resolve the differences in a just and impartial manner. With respect, we agree with the learned judge when she observed as follows:

> It of course cannot be denied that Tan Sri Datuk Amar Steve Shim Lip Kiong, being a Sarawakian, is in a better position to appreciate the geography of the project site, particularly it's remoteness and accessibility but that is not to say that Mr. Bhag Singh could not be forced, by the circumstances of his appointment, to quickly acquire the same knowledge. I am sure if the needs arises, evidence could be led to show the geographical impediments which are of concern to the plaintiff and the parties could even suggest to the arbitrator to visit the project site. The knowledge is other words, is not impossible to acquire and is not such that it is, with respect, dependent on the inherent capability of the plaintiff's arbitrator of the choice.

[20] Before we conclude the discussion on the first ground, we must say that if a party had agreed with an open eyes and full knowledge and comprehension of a clause in the contract that in the event they fail to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the Director of the KLRCA, such a party cannot subsequently turn around and contend that it agrees to the settlement of disputes by arbitration but only by the arbitrator of his/her own choice.

[21] In our view, the court cannot interpose and interdict the appointment of an arbitrator whom the parties have agreed to be appointed by the named appointing authority under the terms of the contract, except in cases where it is proved that there are circumstances which give rise to justifiable doubt as the first respondent's impartiality or independence or that the first

respondent did not possess the qualification agreed to by the parties. The appellant fails to persuade us that the first respondent should be disqualified on those grounds.

Ground (ii)

[22] As regards the second ground, it is not in dispute that the parties had agreed in the contract dated 27 February 2009 in cl. 54(c) that the arbitration to be conducted at the KLRCA in Kuala Lumpur. The learned judge was correct in holding that the court had to respect what the parties themselves had intended and agreed in writing.

[23] Arbitration is a matter of contract and the court must rigorously enforce arbitration agreement according their terms, including terms that specify the appointment of an arbitrator that will arbitrate their disputes.

Conclusion

[24] For the reasons set forth above, we find that the appeal is *sans* merit and therefore should be dismissed with costs of RM10,000. Deposit to be refunded.

[25] The arbitrator has already been appointed. He should proceed in the matter and decide the dispute expeditiously.